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Yeo Eng Lam v Infinity Vantage Sdn Bhd

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO N-02(IM)(NCvC)-507–03 OF 2018
UMI KALTHUM, SURAYA OTHMAN AND STEPHEN CHUNG JJCA
10 JUNE 2020

C *Civil Procedure — Stay of proceeding — Application for stay to be referred to arbitration — Whether appellant had taken 'any other steps in the proceedings' to disqualify her from applying for stay of proceedings under s 10(1) of Arbitration Act 2005 — Arbitration Act 2005 s 10(1)*

D The respondent ('plaintiff') filed an action against the appellant ('defendant') for breach of contract and the plaintiff was seeking a sum of RM7m pursuant to a joint venture agreement ('the JVA') between the parties. On 9 October 2017, the defendant filed an application in encl 5 to disqualify the plaintiff's solicitors to act for the plaintiff. Enclosure 5 was premised on the basis that the E plaintiff's solicitors had acted as common solicitors of the parties in the preparation of the JVA. Then, on 13 October 2017, the defendant filed her statement of defence and counterclaim. On 17 October 2017, the defendant vide encl 8 filed an application under s 10 of the Arbitration Act 2005 ('the F Act'), to stay the proceedings at the High Court and to essentially refer the dispute to arbitration pursuant to cl 29.3 of the JVA. The High Court dismissed the defendant's application. Aggrieved by the said decision, the defendant filed this appeal. The issue for determination was whether the defendant had taken 'any other steps in the proceedings' to disqualify her from G applying for a stay of proceedings under s 10(1) of the Act.

Held, dismissing the appeal:

(1) The two steps taken by the defendant ie filing of encl 5 and statement of defence and counterclaim were made without express nor unequivocal H reservation on her rights to refer the matter to arbitration. The pleadings of the defendant ran counter to her wish to refer the dispute to arbitration. The defendant could not be heard to excuse herself from filing the statement of defence because of the learned deputy registrar's directions as she could have easily told the same that she would be filing I an application for stay of the High Court proceedings soonest. The declaratory reliefs sought by her in her counterclaim, let alone praying in the alternative for the claims before the court be referred to arbitration, showed a clear intention of the defendant to proceed with the trial and the abandonment of her choice to refer the dispute to arbitration.

Therefore, the filing of encl 8 was made after the defendant had taken steps in the proceedings within the meaning of s 10(1) of the Act and was merely an afterthought. Failure of the defendant to comply with the prerequisite requirements under s 10(1) of the Act disqualified her from obtaining a stay (see paras 21–24).

(2) The application of encl 5 was a clear indication of the intention and direction of the defendant's mind, that was, to litigate the matter in the court of law. It was a clear further step taken by the defendant to proceed with the trial. There was no indication or a clear and unequivocal reservation of the defendant's right to refer the matter to arbitration. The defendant had taken active steps to litigate the matter in the court of law prior to making an application for a stay under s 10(1) of the Act (see paras 25–26).

[Bahasa Malaysia summary

Responden ('plaintif') memfailkan tindakan terhadap perayu ('defendan') kerana melanggar kontrak dan plaintif memohon sejumlah RM7 juta berdasarkan perjanjian usaha sama ('JVA') antara pihak-pihak. Pada 9 Oktober 2017, defendan telah memfailkan permohonan dalam lampiran 5 untuk membatalkan peguam plaintif untuk bertindak kepada plaintif. Lampiran 5 didasarkan atas dasar bahawa peguam plaintif telah bertindak sebagai peguam bersama pihak-pihak dalam pengurusan JVA. Kemudian, pada 13 Oktober 2017, defendan memfailkan pernyataan pembelaan dan tuntutan balasnya. Pada 17 Oktober 2017, defendan melalui lampiran 8 memfailkan permohonan di bawah s 10 Akta Timbang Tara 2005 ('Akta'), untuk menangguhkan prosiding di Mahkamah Tinggi dan pada dasarnya merujuk pertikaian itu ke timbang tara menurut klausa 29.3 JVA. Mahkamah Tinggi menolak permohonan defendan. Terkilan dengan keputusan tersebut, defendan memfailkan rayuan ini. Isu untuk pertimbangan adalah sama ada defendan telah mengambil 'langkah lain dalam prosiding' untuk membatalkannya dari memohon penangguhan prosiding di bawah s 10(1) Akta.

Diputuskan, menolak rayuan:

(1) Dua langkah yang diambil oleh defendan iaitu pemfailan lampiran 5 dan pernyataan pembelaan dan tuntutan balas dibuat tanpa adanya kesan yang jelas atau nyata mengenai haknya untuk merujuk perkara tersebut ke timbang tara. Pliding defendan bertentangan dengan keinginannya untuk merujuk pertikaian itu ke timbang tara. Defendan tidak dapat didengar untuk dikecualikan dirinya dari memfailkan pernyataan pembelaan kerana arahan timbalan pendaftar yang bijaksana kerana dia dapat dengan mudah mengatakan kepada yang sama bahawa dia akan memfailkan permohonan penangguhan prosiding Mahkamah Tinggi secepatnya. Relif perisytiharan yang dipohon olehnya dalam tuntutan

balasnya, apalagi permohonan sebagai alternatif untuk tuntutan sebelum mahkamah dirujuk ke timbang tara, menunjukkan niat yang jelas dari defendan untuk meneruskan perbicaraan dan meninggalkan pilihannya untuk merujuk pertikaian tersebut kepada timbang tara. Oleh itu, pemfailan lampiran 8 dibuat setelah defendan mengambil langkah dalam prosiding tersebut dalam erti s 10(1) Akta dan hanya merupakan pemikiran semula. Kegagalan defendan untuk memenuhi syarat-syarat di bawah s 10(1) Akta membatalkan dia daripada mendapatkan penangguhan (lihat perenggan 21–24).

(2) Permohonan lampiran 5 adalah petunjuk yang jelas tentang niat dan arah fikiran defendan, iaitu, untuk melitigasi masalah itu di mahkamah. Ini adalah langkah jelas yang diambil oleh defendan untuk meneruskan perbicaraan. Tidak ada petunjuk atau penolakan hak defendan yang jelas dan nyata untuk merujuk perkara itu ke timbang tara. Defendan telah mengambil langkah aktif untuk melitigasi masalah tersebut di mahkamah sebelum membuat permohonan penangguhan di bawah s 10(1) Akta (lihat perenggan 25–26).]

Cases referred to

PP Persero Sdn Bhd v Bimacom Property & Development Sdn Bhd [1999] 6 MLJ 1, HC (refd)

Sanwell Corp v Trans Resources Corp Sdn Bhd & Anor [2002] 2 MLJ 625, FC (folld)

Legislation referred to

Arbitration Act 2005 s 10, 10(1)

Rules of Court 2012 O 18, O 92 r 4

Appeal from: Civil Suit No NA-22NCvC-57–08 of 2017 (High Court, Seremban)

Anantha Krishnan (Anantha Krishnan) for the appellant.

Arumugam Ganapathy (Kiranjeet Kaur a/p Baldeep Singh with him) (Ghazi & Lim) for the respondent.

Umi Kalthum JCA:

INTRODUCTION

[1] Infinity Vantage Sdn Bhd, the respondent/plaintiff, filed an action against one Yeo Eng Lam, the appellant/defendant, vide Civil Suit No NA-22NCvC-57–08 of 2017 at the High Court in Malaya at Seremban, Negeri Sembilan ('the civil suit').

[2] The respondent's/plaintiff's claim was for breach of contract and the respondent/plaintiff was seeking a sum of RM7m pursuant to a joint venture agreement ('JVA') dated 3 October 2014 between the parties. Clause 29.3 of the JVA provides that all disputes between the parties are to be referred to arbitration.

[3] On 17 October 2017, the appellant/defendant vide encl 8 at the High Court, filed an application under O 92 r 4 of the Rules of Court 2012 ('the ROC') and/or s 10 of the Arbitration Act 2005 (Act 646) to stay the proceedings at the High Court and to essentially refer the dispute to arbitration.

[4] On 8 February 2018, the High Court dismissed the appellant's/defendant's application in encl 8 with costs of RM3,000 subject to the payment of the allocatur's fee.

[5] Aggrieved by the said decision, the appellant/defendant filed an appeal to this court.

[6] For the purpose of this appeal, the parties will be referred to as they were at the High Court.

BACKGROUND FACTS

[7] The facts relevant to this appeal are as follows. The plaintiff initiated the civil suit against the defendant on 25 August 2017 alleging, amongst others, that the defendant had breached the JVA between them and as a result of which the plaintiff is seeking a sum of RM7m with interest, special damages and other reliefs from the defendant.

[8] During case management at the High Court on 25 September 2017, the learned Deputy Registrar directed the defendant to file her statement of defence on or before 13 October 2017. The defendant then filed the memorandum of appearance on 3 October 2017.

[9] On 9 October 2017, the defendant filed an application in encl 5 to disqualify the plaintiff's solicitors, Messrs Ghazi & Lim, to act for the plaintiff. Enclosure 5 was premised on the basis that the plaintiff's solicitors had acted as common solicitors of the parties in the preparation of the JVA. As such, they were privy to confidential information pertaining to the defendant and there will be a serious conflict of interest if the said solicitors were to represent the plaintiff against the defendant in the civil suit.

[10] The defendant alleged in her affidavit in support to encl 5, at para 6,

A that the solicitors for the plaintiff will be called to testify as witnesses of any material and disputed questions of fact in this action. Enclosure has yet to be heard by the High Court.

B **[11]** Then, on 13 October 2017, the defendant filed her statement of defence and counterclaim. Four days after the filing of the statement of defence and the counterclaim the defendant filed the notice of application encl 8 under s 10 of Act 646, being the subject matter of this appeal, for the proceedings at the High Court to be stayed pending reference to arbitration pursuant to cl 29.3 of the JVA.

C

[12] The plaintiff objected to the application in encl 8 and argued that the defendant had participated in the proceedings at the High Court and had in fact taken two other steps prior to the filing of the stay application; the two

D other steps being the filing of encl 5 and the statement of defence and the counterclaim. The stay application should have been filed before the defendant had taken any other steps at the High Court proceedings and the defendant's failure to comply with the conditions prescribed in s 10(1) demonstrated the defendant's participation in the proceedings at the High Court and should be

E precluded from now referring the matter to arbitration.

[13] On the contrary, the defendant argued that the defendant has not taken any steps in the proceedings that would disentitle her to apply for a stay order to be granted. The defendant argued that application to disqualify the

F plaintiff's solicitors was merely a defensive step to preclude a potential conflict from arising and to protect the defendant's position from being subsequently compromised. This step was not in any way evinced any intention on the defendant's part to abandon her right to refer the matter to arbitration.

G

[14] The defendant further argued that the acts of filing the statement of defence and the counterclaim were done in compliance with the court's directions and they were done with 'express reservation' that the defendant reserves her right to refer the matter to arbitration.

H

THE APPEAL

[15] The sole issue to be determined in this appeal is whether the defendant has taken 'any other steps in the proceedings' to disqualify her from applying

I for a stay of proceedings under s 10(1) of Act 646.

[16] Section 10(1) of Act 646 is reproduced herewith for reference:

10 Arbitration agreement and substantive claim before court

(1) A court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement shall, where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

[17] Section 10(1) has set out clear requirements for a stay application to be granted. The requirements are, amongst others, for the application to be made before a party (the defendant) has taken any other steps in the proceedings. The next question posed to this court was, what would constitute 'steps in the proceedings'?

[18] This court was guided by the principles laid out in the Federal Court decision of *Sanwell Corp v Trans Resources Corp Sdn Bhd & Anor* [2002] 2 MLJ 625 as to what would tantamount to 'steps in the proceedings' and 'any other action in the proceedings' as per Mohtar Abdullah FCJ (as he then was) at p 638:

... Therefore, the legal position in Malaysia may be neatly summarised as follows:

(a) the entry of appearance is the mandatory procedural step to be taken by an applicant in proceedings in the High Court. It is a step in the proceedings as required by the RHC. However, it is a permitted, excluded or an exempted step in the proceedings that does not amount to a step in the proceedings within the meaning of the s 6 of the Act which would prejudice the applicant's right to apply for a stay of the proceedings;

(b) if the applicant has served any pleadings, then he has clearly taken a step in the proceedings within the meaning of s 6 of the Act. He has thereby elected to proceed with the proceedings in the High Court and would be barred from applying for a stay of proceedings to refer the dispute to arbitration;

(c) if he has taken any other action in the proceedings (other than steps (a) or (b) abovementioned), the court will then have to consider whether such action amounts to a step in the proceedings by determining the nature of the action and whether or not it indicates an unequivocal intention to proceed with the suit and to abandon the right to have the dispute disposed off by arbitration.

[19] This court was also referred to a decision in the case of *PP Persero Sdn Bhd v Bimacom Property & Development Sdn Bhd* [1999] 6 MLJ 1 (HC) where, in dismissing the appeal to the judge in chambers for a stay application pending reference to arbitration, Abdul Malik Ishak J (as he then was) held, at p 1, as follows:

(1) A stay will not be granted if the applicant has taken steps in the proceedings after entering appearance in the court proceedings. The applicant must unequivocally elect to refer the matter only to arbitration and nothing else. The conduct of the

A defendant in seeking the prayer *[to strike out the plaintiff's writ]* clearly demonstrated a desire to abandon the application for a stay in favour of allowing the matter to proceed to trial. The act of the defendant had the effect of invoking the jurisdiction of the court to proceed to hear the case in open court and not to refer the matter to arbitration nor to stay the matter. By seeking the prayer, the defendant B had taken the necessary steps in the proceedings thereby precluding a stay and reference to arbitration. The defendant did not unequivocally elect to refer the matter to arbitration. In the technical sense, the defendant took a step in the proceedings thereby barring resort to s 6 of the Arbitration Act 1952 (see p 22G-I).

C **[20]** Two things are clear from the decisions referred above. First, save for filing the memorandum of appearance, if the intention of a party to an agreement is to give effect to the arbitration clause in their agreement, that party must ensure the stay application is filed at the soonest possible time before taking any other steps in the proceedings that would indicate an D intention to proceed with the litigation in court. Second, it can be surmised that any application made to the court must clearly and unequivocally state that it was made whilst reserving that party's right to refer the matter to arbitration.

E **[21]** Prior to the filing of encl 8, but after filing her memorandum of appearance on 3 October 2017, the defendant had filed an application to disqualify Messrs Ghazi & Lim, the plaintiff's solicitors in encl 5 on 9 October 2017. The defendant then filed her statement of defence and the counterclaim on 13 October 2017. We were of the view that these two steps taken by the F defendant (that is, filing of encl 5 and statement of defence and counterclaim) were made without express nor unequivocal reservation on her rights to refer the matter to arbitration, notwithstanding paras 1 and 3 of her statement of defence where it is stated as follows:

G 1. Prosiding yang dibawa oleh Plaintiff di hadapan Mahkamah Yang Mulia ini adalah perkara subjek perjanjian timbangtara. Pembelaan ini oleh itu difailkan tanpa prejudis kepada hak Defendan untuk penggantungan prosiding dan membawa perkara yang dirujuk kepada timbangtara.

...

H 3. Sementara menunggu resolusi tersebut, pemfailan Pembelaan ini tidak boleh dianggap sebagai langkah dalam prosiding.

[22] Moreover, the defendant had not only filed her statement of defence but also went on to even include her counterclaim, albeit making reference to refer I the dispute to arbitration in para 25, where the reliefs sought are mainly for declarations and as an alternative prayer 31(h) for the claims to be referred to arbitration. The pleadings of the defendant ran counter to her wish to refer the dispute to arbitration as stated in *Sanwell*. We took this position notwithstanding the fact that it was as per the learned deputy registrar of the

High Court's direction that the defendant filed her statement of defence. The defendant could not be heard to excuse herself from filing the statement of defence because of the learned deputy registrar's directions as she could have easily told the same that she would be filing an application for stay of the High Court proceedings soonest.

[23] Aside from the fact that the stay application was filed after the aforementioned two steps taken, it is pertinent to scrutinise the contents of the defendant's application in encl 5, specifically para 6. The defendant explained and impressed upon the court on the necessity of her application to disqualify the plaintiff's solicitors. This application was premised on the defendant's contention that the solicitors may be called to testify as witnesses of any material and disputed questions of fact in the civil suit. This was what she deposed:

> 6. I verily aver that since Messrs Ghazi & Lim was involved in the preparation and drafting of the Joint Venture Agreement and the Power of Attorney in this action, advised me thereon and affirmed the Statutory Declaration for the lodgement of the Plaintiff's caveats, the solicitors of Messrs Ghazi & Lim may be called to testify as witness of any material and disputed questions of fact in this action.

To us, this, as well as the declaratory reliefs sought by her in her counterclaim, let alone praying in the alternative for the claims before the court be referred to arbitration, showed a clear intention of the defendant to proceed with the trial and the abandonment of her choice to refer the dispute to arbitration. In other words, her reservation to refer the dispute to arbitration is not unequivocal.

[24] Therefore, upon perusing the chronology of events in this appeal, it was apparent to us that the filing of encl 8 was made after the defendant had taken steps in the proceedings within the meaning of s 10(1) of Act 646 and that the filing of encl 8 was merely as an afterthought. Failure of the defendant to comply with the prerequisite requirements under s 10(1) disqualified her from obtaining a stay under the same.

[25] Whilst the defendant's contention that the filing of the notice of application in encl 5 did not fall within the definition of pleadings as discussed in the decision of *Sanwell* is true (see definition of 'pleadings' in *A Concise Law Dictionary* by PG Osborn (Sweet & Maxwell, 1964, 5th Ed) where 'pleadings' is defined — 'Written or printed statements delivered alternately by the parties to one another, until the questions of fact and law to be decided in an action have been ascertained; ie, until issue is joined. The pleadings delivered (a) by the plaintiff, (b) by the defendant, are as follows: (1)(a) statement of claim; (b) defence. (2)(a) reply…' (see also O 18 of the Rules of Court 2012), however, we viewed the substance of encl 5, and not the form, where the said application to our minds was a clear indication of the intention and direction of the defendant's mind, that is, to litigate the matter in the court of law. We were also

not persuaded by the defendant's contention that encl 5 was a mere peripheral defensive manoeuvre nor was it a tactical strategy of the defence. We were of the view that it was a clear further step taken by the defendant to proceed with the trial.

[26] Upon careful perusal of encl 5, the statement of defence and the reliefs sought in the counterclaim, we were unable to find any indication or a clear and unequivocal reservation of the defendant's right to refer the matter to arbitration. The absence of such specific and unequivocal reservation only confirmed our findings that the defendant had taken active steps to litigate the matter in the court of law prior to making an application for a stay under s 10(1).

CONCLUSION

[27] Thus, based on the abovementioned reasons, we were of the view that the learned judicial commissioner had not erred either in fact or in law in dismissing the defendant's application in encl 8. We were also of the view that this appeal did not warrant any appellate intervention.

[28] Hence, we unanimously dismissed the appeal. We ordered the costs in the sum of RM10,000 to be paid by the defendant to the plaintiff, subject to the payment of the allocatur's fee.

Appeal dismissed.

Reported by Ahmad Ismail Illman Mohd Razali